No. 21,900

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OTIS CROOKER,

Appellant,

-vs-

WARREN GRAFT,

Appellee.

Appeal from the United States District Court for the District of Montana, Helena Division

PETITION FOR REHEARING

SMALL & CUMMINS and
CARL A. HATCH
300 Fuller Avenue
Helena, Montana

Attorneys for Appellant

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PETITION FOR REHEARING

The appellant above-named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition, represents to the Court as follows:

Contrary to our argued position that the appellee, Warren Graft, was negligent in various particulars in aborting his takeoff, and that such negligence was the

immediate and proximate cause of the accident, the Court, by its decision here, has held that any such negligence was not the proximate cause of the accident, and that there is no indication that the plane was in any manner out of control at the time it landed as a result of the aborted takeoff. Thus this Court has obviously concluded, as did the District Court, that appellee Graft had his plane under complete control; and that his rollout in its initial stage was no different from that which might have followed a normal landing. In this connection, the District Court pointed out that:

> "In the excitement and emergency of an unplanned landing he might have executed a faulty touchdown. His negligence would have barred recovery for damages arising from any of these events. Here, however, plaintiff was in no different position than a pilot who had arrived at that place on the runway without negligence and was rolling to a stop."

This final determination by the Court of the factual situation up to that point has been considered and determined, and we do not propose here to argue further any such matters. However, we believe that this necessarily creates an additional situation which has not heretofore been adequately presented nor considered by the Court, to-wit:

Assuming now that appellee, Graft, made a normal landing and started on a normal rollout and, as found by the

District Court, that he was not laboring under any undue excitement as a result of the emergency or unplanned landing, which in any manner caused him to make a faulty touchdown, then we must consider him in the same position as any experienced pilot having made a normal landing and commenced a normal rollout. Considered in this light, then we respectfully submit that appellee, Graft, was himself negligent in failing to observe that which was clearly in front of him to have been seen had he been looking.

As pointed out by the Findings and Opinion of the District Court, the line of demarcation between the usable strip and the unusable portion was not very clearly apparent at the north end of the field, but "at the south end, there was a noticeable berm of soil and substantial differences in the appearance of the weeds," establishing such line of demarcation. This accident occurred at the south end of the field where such line of demarcation was clearly apparent. This is substantiated by the pictures, Exhibits Nos. 6 and 7, which are before the Court. Therefore, and in the light of the Court's present decision, we sincerely believe that there is now to be considered a further element of negligence on the part of appellee, Graft, which led directly to the occurrence of this accident, to-wit, his failure to observe the berm along the west edge of the landing strip, which (even in the absence of artificial markers) was clearly apparent had he been looking. If his landing was normal and he was suffering under no stress of an emergency landing, then there could have been no valid reason for

him to have run off the west edge of the runway if he had been exercising reasonable care. Such negligence should bar any recovery here, regardless of any and all other preceding negligent acts or omissions on his part, which the Court has determined were not the proximate cause of the accident.

In such situation, the actions of appellee, Graft, were clearly subject to application of the rules frequently enumerated by our courts with reference to keeping a proper lookout ahead. Thus, in the case of *Autio v. Miller*, 92 Mont. 150, 11 P.(2d) 1039, it was held (quoting syllabus):

> "The driver of an automobile must not only look straight ahead but laterally ahead as well, and he is presumed to see that which he could see by looking; the duty to keep a lookout includes the duty to see what is in plain sight. . . ."

See also, *Koppang v. Sevier*, 106 Mont. 79, 75 P.(2d) 790, and 38 Am. Jur. (Negligence), Sec. 191, p. 868.

For the foregoing reasons, we respectfully submit that this Petition for Rehearing should be granted.

SMALL & CUMMINS and
CARL A. HATCH

By: Floyd O. Small
Attorneys for
Appellant

STATE OF MONTANA)
ss.
County of Lewis and Clark)

FLOYD O. SMALL, being first duly sworn on oath, certifies and says:

That he is one of the attorneys for Appellant in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and is not interposed for delay.

Floyd O. Small

SUBSCRIBED AND SWORN to before me at Helena, Montana, this _____ day of May, 1968.

Betty V. Alke
NOTARY PUBLIC for the State of Montana. Residing at Helena, Montana. My Commission expires November 27, 1970.

(SEAL)

Service of the foregoing PETITION FOR REHEARING and receipt of a copy thereof are hereby acknowledged this _____ day of May, 1968.

RISKEN & SCRIBNER

By: _____
Attorneys for Appellee